IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 976 of 1993

For Approval and Signature:

Hon'ble MR.JUSTICE J.M.PANCHAL
and
Hon'ble MR.JUSTICE SHARAD D.DAVE

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

PRAJAPATI JAYANTILAL AMARSINHBHAI

Versus

STATE OF GUJARAT

Appearance:

MR KB ANANDJIWALA for Petitioners

Ms.Harsha Devani, learned A.P.P. for Respondent No. 1

CORAM : MR.JUSTICE J.M.PANCHAL
and
MR.JUSTICE SHARAD D.DAVE

Date of decision: 27/04/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE J.M.PANCHAL)

1. The appellants who are son and mother respectively have filed this appeal under sec. 374 of the Code of Criminal Procedure and questioned the legality of the judgment dated August 7, 1993 rendered by the learned Sessions Judge, Surendranagar in Sessions Case no. 97 of 1992 by which they are convicted under Sec. 302 read with 114 of I.P.C. and sentenced to R.I. for life and fine of Rs.100/-, in default S.I for 8 days for murder of wife of appellant no. 1.

2. Deceased Jayaben who was wife of appellant no. 1 was residing in Street no. 16, Ratanpar, Jorawar nagar, Taluka : Vadhvan, District : Surendranagar with the appellants and her two minor children. Her marriage with the appellant no. 1 had taken place prior to 10 years of the date of incident which is July 12, 1992. The appellant no. 1 was a clerk in a commercial firm in life. The appellant no. 1 had received the salary from his employer but had not given any amount to the deceased even after 10 to 12 days to enable the deceased to purchase necessary articles needed in the house. Though the deceased was entreating the appellant to give the amount, no amount was given by the appellant no. 1 and he was pressurizing the deceased to keep food ready to be served. On July 12, 1992, the deceased had prepared tea and bhakhri (thick hard bread) for appellants and children. The deceased had invited the appellants to take tea and bhakhri but the said offer was spurned by the appellants on the ground that they were not inclined to eat things prepared by the deceased. It is the case of the prosecution that thereafter the appellant no. 2 had poured kerosene over the deceased and the appellant no. 1 had set her on fire by lighting a match stick. On receiving burn injuries, the deceased had raised shouts for help and therefore witness Ishwarbhai Nanji, witness Ramjibhai Khimji and witness Ghelabhai Varjangbhai had rushed to the place of the incident and an attempt was made to extinguish the fire by means of a cotton bed.The deceased was thereafter removed to Mahatma Gandhi hospital, Surendranagar at about 8.30 a.m., where she was treated by Dr.Lalitbhai Maganlal Priyadarshi who was on duty as Medical Officer. The doctor had found the deceased conscious and therefore tried to know the history of burn injuries from the deceased. The deceased informed the doctor that her husband and her mother-in-law together had poured kerosene over her and had set her on fire. The history as narrated by the deceased was noted by the doctor on medical papers and the doctor had informed Smt.Bhanumatiben Gangadas who was

then Police Officer in-charge of Jorawarnagar police station at about 9.05 a.m. that the deceased was admitted in the hospital with burn injuries and that she had stated that her husband and her mother-in-law had set her on fire. The information conveyed by Dr.Priyadarshi was noted down by Smt.Bhanumatiben in station dairy and she had informed about the same to Sub-Inspector of the police station. She had prepared a copy of the said entry and handed over the same to P.S.I. of the police station for investigation. At the same time, she had also reported to Executive Magistrate to record the dying declaration of the deceased. On receipt of the copy of entry made in station dairy from Smt.Bhanumatiben, P.S.I. Mr.A.R.Zhala of Jorawarnagar police station had gone to Mahatma Gandhi hospital. Before going to the hospital, P.S.I.Mr.Zhala had informed Smt.Sharmistaben Trivedi who was then the Chairman, Nari Kendra, Surendranagar about the incident and requested her to go to Mahatma Gandhi hospital. On receipt of the information, Smt. Sharmistaben had also gone to the hospital. After going to the hospital, Shri Zhala had ascertained from Dr.Arun Pragji Lathia whether the deceased was conscious and in a fit state of mind to make statement. Dr.Lathiya, after examining the deceased, had informed P.S.I.Mr.Zhala that deceased was conscious and in a fit state of mind to make the statement. Therefore, P.S.I.Mr.Zhala had recorded the complaint of the deceased in the presence of Chairman of Nari Kendra wherein also it was stated by the deceased that the appellant no.2 had poured kerosene over her and the appellant no. 1 had set her on fire. The complaint of the deceased was recorded between 9.45 a.m. to 10.10 a.m. After reducing the complaint of the deceased into writing, Mr.Zhala had obtained the thumb impression of the deceased as well as signature of Smt. Sharmistaben Trivedi thereon. On the complaint, Dr.Lathiya had made an endorsement to the effect that "Patient is conscious and cooperative and able to give answers with full consciousness". The complaint recorded by P.S.I.Mr.Zhala was sent to Joravarnagar police station for registration of offence along with forwarding letter and on receipt of the same, the offence was registered at Joravarnagar police station by Smt.Bhanumatiben who was Police Officer in-charge of Joravarnagar police station. Meanwhile, Mr.Tapubhai M Vaghela who was on duty as Dy.Mamlatdar in the office of Mamlatdar, Vadhvan had gone to Mahatma Gandhi Hospital for the purpose of recording dying declaration of the deceased. Mr.Vaghela had ascertained from Dr.Lathiya whether the deceased was conscious and in a fit state of mind to make statement. The doctor, after examining the deceased, had informed Dy.Mamlatdar Shri Vaghela that the deceased was conscious and was in a fit

state of mind to make statement. Therefore, the Dy.Mamlatdar and Executive Magistrate Shri Vaghela had started recording the dying declaration of the deceased at 10.45 a.m. and completed the same at 11.10 a.m. In the dying declaration short history of the incident was given and it was stated by the deceased that the appellant no. 2 had poured kerosene over her and the appllent no. 1 had set her on fire. On the dying declaration an endorsement was made by Dr.Lathiya to the effect that "patient is conscious and cooperative and able to give answers with full consciousness". Meanwhile, the appellant no. 1 was insisting that the deceased should be removed to Ahmedabad hospital, but the doctors treating the deceased were not inclined to refer the deceased to Ahmedabad hospital. However the appellant no.1, against the medical advice, had decided to remove the deceased to Ahmedabad hospital. Therefore, transfer form was prepared by the authorities of Mahatma Gandhi hospital mentioning the history of assault stated by the deceased as well as the fact that the complaint and dying declaration were recorded. It was also mentioned in the medical papers that the deceased was being removed against the medical advice. The deceased was brought to Civil Hospital, Ahmedabad at about 5.10 p.m. with transfer memo by Kanjibhai Balubhai who is the elder brother of the appellant no. 1. Though in the transfer form, it was stated that the history as narrated by the deceased was noted, Dr.Shah had again tried to know the history of assault from the deceased and it is alleged that the deceased had stated before the doctor that she had received burn injuries because end of her sari had touched the flame of the stove while preparing Bhakhri. Dr.Shah did not make any arrangement for getting the dying declaration of deceased recorded because in the memo of transfer, it was mentioned that dying declaration of the deceased was already recorded. The history stated by the deceased before Dr.Shah was conveyed to Police Constable Mr.Ramjibhai who was on duty at O.P.D.Department of Civil Hospital which was noted down by him in the register. During the course of treatment, the deceased expired on July 16, 1992 at about 12.10 noon. Further investigation into the case was made by P.S.I.Mr.Zhala. The dead body of the deceased was sent for post-mortem examination and autopsy on her dead body was performed by Dr.Haresh B Palikar at Civil Hospital, Ahmedabad. At the conclusion of investigation, the appellants were chargesheeted for the offences punishable under Sec. 302, 498-A, 504 read with 114 of I.P.C. As the offence punishable under Sec. 302 of I.P.C. is exclusively triable by Court of Sessions, the case was committed to Sessions Court, Surendranagar for

trial where it was numbered as Sessions Case no. 97 of 1992. The charge of the offences punishable under Sec. 302, 498-A, 504 read with 114 of I.P.C. was framed by the learned Sessions Judge at exh. 3 against the appellants. The charge was read over and explained to the appellants who pleaded not guilty to the same and claimed to be tried. The prosecution, therefore, examined in all 14 witnesses to prove its case against the appellants. They were (1)Executive Magistrate Tapubhai Maganlal Vaghela p.w.1 exh. 7, (2)Dr.Lalitbhai Maganlal Priyadarshi p.w.2 exh. 9, (3) Dr.Arun Pragjibhai Lathiya p.w.3 exh. 12, (4) Dr.Haresh D Palikar p.w.4 exh. 15, (5) Niranjan C Bhadeliya p.w. 5 exh. 18, (6) Dalpatbhai Nanubhai p.w.6 exh. 23, (7) Smt.Sharmistaben Trivedi p.w.7 exh. 25,
(8) Ishwarbhai Nanjibhai p.w.8 exh. 26, (9) Ramjibhai Khimjibhai p.w.9 exh. 27, (10) Monghiben Kanjibhai p.w.10 exh. 28, (11) Ramjibhai Kalidas p.w.11 exh. 31, (12)I.O. Mr.A.R.Zhala p.w.12 exh. 33, (13)Dr.Rameshchandra Bhagubhai Shah p.w.13 exh. 38 and (14) Smt.Bhanumatiben Gangadas p.w.14 exh. 41. The prosecution also produced documentary evidence such as dying declaration of the deceased recorded by Executive Magistrate Shri Vaghela, medical papers prepared at Mahatma Gandhi hospital, Surendranagar, injury certificate of appellant no. 1, post mortem notes of the deceased, panchanama of place of occurrence, inquest report, complaint of the deceased recorded by P.S.I.Mr.Zhala etc. to prove its case against the appellants.

After recording of evidence of prosecution witnesses was over, the learned Judge explained to the appellants the circumstances appearing in the evidence against them and recorded their statements under Sec. 313 of the Code of Criminal Procedure, 1973. In their respective further statement, the appellants claimed that the case of the prosecution against them was false. Further the appellants examined two witnesses in support of their defence. They were Gelabhai Varjangbhai D.w.1 at exh. 50 and Gordhandas Ukabhai D.w.2 at exh. 52. The appellants also jointly filed written statement offering their explanation about the incident. The appellant no. 1 pointed out his bad economic condition in the written statement and pleaded that the deceased had committed suicide where as the appellant no. 2 claimed that she was not present at the time of incident and had gone to asylum where she was serving.

On appreciation of evidence, the learned Sessions Judge held that evidence of witness Ramjibhai Khimjibhai,

witness Ishwarbhai Nanjibhai and defence witness Gelabhai Varjangbhai to the effect that appellant no. 1 had sustained injuries in an attempt to extinguish fire on the deceased by means of quilt (mattress made by joining small pieces of cloth together) and that the appellant no. 1 was found wearing a bath towel round the waist at the time of incident was not reliable at all. The learned Judge deduced that witness Mongiben Kanjibhai who was mother of the deceased had turned hostile to prosecution and her evidence was of little assistance to the prosecution. After referring to the evidence of P.S.I.Mr.Zhala, Smt. Sharmistaben Trivedi who was then Chairman of Nari Kendra, Surendranagar, Executive Magistrate Shri Tapubhai Vaghela, Dr. Lalitbhai M Priyadarshi who had recorded the history of incident as narrated by the deceased, medical papers etc. the learned Judge reasoned that oral dying declaration made by the deceased before Dr.Priyadarshi as well as complaint registered by P.S.I.Mr.Zhala and dying declaration recorded by Mr.Vaghela were trustworthy and reliable. The learned Judge held that the history of burn injury recorded by Dr. Shah at Ahmedabad hospital was contrary to circumstantial evidence proved in the case and was not reliable. The learned Judge in detail considered the question whether the deceased had committed suicide or received burn injuries accidentally and held that the deceased had neither committed suicide nor received burn injuries accidentally but was set on fire by the appellant no. 1 after kerosene was poured over her by the appellant no. 2. The learned Judge also held that the prosecution had failed to prove its case against the appellants under sec. 498-A and 504 of I.P.C. As the learned Judge relied upon the dying declarations of the deceased implicating the appellants, he has convicted the appellants under Sec. 302 read with 114 of I.P.C. and sentenced them to R.I. for life and fine of Rs.100/-, in default S.I. for 8 days by judgment dated August 7, 1993 giving rise to the present appeal.

Mr.K.B.Anandjiwala, learned Counsel for the appellants, after taking us through the entire evidence on record, submitted that the evidence of witness Ishwarbhai, witness Ramjibhai, witness Mongiben and defence witness Gelabhai indicates that on hearing shouts of help raised by the deceased as well as appellant no. 1 those witnesses had rushed to the place of incident and found quilt on the deceased which unerringly establishes that an attempt was made by the appellant no.1 to extinguish fire on the deceased which is quite inconsistent with his guilt. The learned counsel referred to the injury certificate of the appellant no.

1 which is on record of the case at exh. 13 and urged that not only the appellant no. 1 had sustained injury on hand but his hair were also partly burnt as well as his bath towel which he was wearing was partly burnt, which in turn corroborates the case of the appellant no. 1 that he had tried to extinguish fire on the deceased and was innocent. After referring to the evidence of witnesses whose names are mentioned above in detail, the learned counsel for the appellants submitted that immediately after the incident, the appellant no. 1 had gone to the house of his mother-in-law wearing a bath towel and informed her about the incident which shows that the appellant no. 1 was totally innocent and this conduct of appellant no. 1 is inconsistent with the theory of homicidal death of the deceased. The learned counsel referred to the evidence of witness Mongiben and argued that as the appellant no.1 was not giving sufficient amount to the deceased for purchase of essential articles, the deceased was fed up with life and had committed suicide but had disclosed the name of appellant no. 1 falsely out of anger towards him. The learned counsel vehemently submitted that the history of assault as noted down by Dr.Priyadarshi as well as complaint recorded by P.S.I.Mr.Zhala and dying declaration recorded by Executive Magistrate, Shri Vaghela are inconsistent with contents of panchanama of place of occurrence and therefore they should not have been relied upon by the learned Judge. The learned counsel, referred to the panchanama of place of occurrence and pleaded that no smell of kerosene was coming out from the dough which was found at the place of incident nor any smell of kerosene was found from flour which was to be used for preparing Bhakhri and these facts establish that kerosene was never poured over the deceased. What was claimed was that Smt.Sharmistaben Trivedi has not stated a word in her deposition as to what was stated by the deceased before P.S.I.Mr.Zhala which indicates that she was not present at the time when complaint of the deceased was recorded but she had deposed before the court against the appellants only because her signature was obtained on the complaint subsequently. The learned counsel referred to the inquest report and submitted that the wardhi which is referred to in the report clearly mentions that as end of sari of the deceased had touched flame she had received the burn injuries and therefore the probability that the deceased might have received burn injuries accidentally is not ruled out. On reference to the medical papers, the learned counsel contended that the general condition of the deceased was poor and as she had received third degree burns, her vocal cord must have been affected

rendering her speechless and therefore the three dying declarations should be discarded. The learned Counsel stressed that there was no reason to disbelieve the testimony of Dr.Rameshchandra Shah to the effect that deceased had stated before him that she had received burn injuries while preparing bhakhri, more particularly when the said history is supported by contents of the panchanama of place of occurrence and therefore the appeal should be accepted. According to the learned Counsel for the appellants, P.S.I. Mr.Zhala has gradually improved his version before the court regarding consciousness of the deceased as well as presence of Chairman of Nari Kendra at the time when complaint of the deceased was recorded and therefore his evidence is not trustworthy. Lastly, the learned counsel emphasized that in view of the conflicting evidence of prosecution witnesses, at least benefit of doubt should be given to the appellants and the appeal should be allowed.

Ms.Harsha Devani, learned A.P.P. submitted that the oral dying declaration made by the deceased before Dr.Priyadarshi at 8.30 a.m. is amply proved by the trustworthy testimony of Dr.Priyadarshi and therefore the learned judge did not commit any error in placing reliance on oral dying declaration as recorded by Dr.Priyadarshi. According to learned A.P.P., complaint of the deceased was recorded by P.S.I. Mr.Zhala in presence of independent witness namely Smt.Sharmistaben Trivedi who was Chairman of Nari Kendra, Surendranagar, after ascertaining from the doctor that the deceased was conscious and in a fit state of mind to make statement and therefore the case of the prosecution against the appellants is also proved by the complaint of the deceased herself. What was emphasized was that the Executive Magistrate Mr.Vaghela had recorded the dying declaration of the deceased after ascertaining from the medical officer on duty that the deceased was conscious and in a fit state of mind to make statement and as this witness has no grudge against the appellants and as no animosity is even remotely suggested by the defence, the learned Judge was justified in relying upon the said dying declaration for convicting the appellants. The learned Counsel for the state pointed out the circumstance that against the medical advice, the deceased was removed by appellant no. 1 to Ahmedabad hospital and as deceased was in the company of relatives of appellants, there was all possibility that she was pressurized to make statement before Dr.Shah exonerating the appellants and therefore the learned Judge was right in discarding the alleged history as given by the deceased before Dr.Shah, more particularly when the said

history completely stands contradicted by the proved evidence on record. The learned Counsel emphasized that the evidence of witness Ishwarbhai, witness Ramjibhai and defence witness Gelabhai does not inspire confidence at all and therefore their evidence should not be accepted by this court. It was argued on behalf of the state that no attempt worth name was made by the appellant to extinguish fire on the deceased and as its case against the appellants is proved by reliable and trustworthy evidence led by the prosecution, the appeal should be dismissed.

We have taken into consideration the submissions advanced at the bar and reappreciated the whole evidence on record.

Before appreciating the evidence of the witnesses and the contents of dying declarations, it would be relevant to notice the law relating to dying declaration. Section 32(1) of the Indian Evidence Act, 1872 is an exception to the general rule that hearsay evidence is not admissible evidence or that unless evidence is tested by cross-examination, it is not credit worthy. Under section 32(1) when a statement is made by a person as to the cause of death or as to any of the circumstances, which result in his death, in cases in which the cause of that person's death comes into question, such a statement, oral or in writing made by the deceased to the witness is a relevant fact and is admissible in evidence. The statement made by the deceased called the dying declaration, falls in that category provided it has been made while in a fit mental condition. It is well settled that conviction can be based on the dying declaration itself provided it is satisfactory and reliable. If there are more than one dying declarations, then the Court has to scrutinise all the dying declarations to find out if each one of them passes the test of being trustworthy. The Court must further find out whether different dying declarations are consistent with each other in material particulars before accepting and relying upon the same. A dying declaration made by a person on the verge of his death has a special sanctity, as at that solemn moment, a person is most unlikely to make any untrue statement. The sanctity attached to dying declaration is that a person on the verge of death would not commit sin of implicating somebody falsely. The shadow of impending death is by itself the guarantee of truth of the statement made by the deceased regarding cause or circumstances leading to his death. The general principle on which this species of evidence is admitted is that they are declarations made in extremity, when the

person is at the point of death and when every hope of this world is gone. At that point of time every motive to falsehood is silenced and the mind is induced by the most powerful consideration to speak the truth. Such a solemn situation is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a court of justice. A dying declaration, therefore, enjoys almost a sacrosanct status as a piece of evidence, coming as it does from the mouth of the deceased victim. Once the statement of dying person and the evidence of the witnesses testifying to the same passes the test of careful scrutiny of the Court, it becomes very important and reliable piece of evidence and if the Court is satisfied that the dying declaration is true and free from any embellishment such a dying declaration by itself can be sufficient for recording conviction even without looking for any corroboration. However,if there are any infirmities of such nature warranting further assurance then the Court has to look for corroboration. The rule of corroboration requires that the dying declaration be subjected to close scrutiny since the evidence is untested by cross-examination. The dying declaration must be accepted, unless such declaration can be shown not to have been made in expectation of death or to be otherwise unreliable. Any evidence adduced for this purpose can only detract from its value, but does not affect its admissibility. One of the important tests of reliability of dying declaration is that the person who recorded it must be satisfied that the deceased was in a fit state of mind. Generally, the following three tests have been devised in judicial pronouncement in order to answer the question whether the dying declaration is true; (1) Was the victim in a position to identify the assailant/s ? (2) Whether the version narrated by the victim is intrinsically sound and accords with probabilities ? and (3) Whether any material part is proved to be false by other reliable evidence ?

In the light of the above referred to principles, we will now proceed to consider the evidence on record. Witness Ramjibhai Khimjibhai exh. 27 has stated in his evidence that on the date of incident he was taking tea at his house in the morning and had gone to the place of the incident on hearing shouts of help raised by the deceased and the appellant no.1. Witness Ishwarbhai Nanjibhai p.w.8 exh.26 and defence witness Gelabhai have stated that they had reached the house of the appellant no. 1 first in point of time. From the testimony of these three witnesses, it is not clear as to who had reached first in point of time at the place of incident

because witness Ishwarbhai Nanjibhai p.w.8 has stated that when he had gone to the place of incident, defence witness Gelabhai and Ramjibhai p.w.9 were present, but defence witness Gelabhai exh. 50 has stated in his evidence that when he had gone to the place of incident, witness Ramjibhai and witness Ishwarbhai had also come and that witness Ishwarbhai and witness Ramjibhai had not reached the place of incident before him but all of them had reached the place of incident at the same time. Witness Ramjibhai p.w.9 has claimed that when he had gone to the place of incident, witness Ishwarbhai and defence witness Gelabhai had reached the deli (front door) of the house of the appellant no. 1. In view of the distance of the house of the appellants from the house of witness Ishwarbhai, it is evident that witness Ramjibhai p.w. 9 must have reached the place of incident first in point of time. Witness Ramjibhai has stated that the door of the house was closed and on push being given, it had opened and thereafter he had gone inside the house. All the three witnesses have stated that the deceased was uttering the words that `she was burnt'. According to the defence of the appellants, this was the first dying declaration made by the deceased in which the appellants were not implicated and they have claimed that three subsequent dying declarations relied upon by the prosecution should be disbelieved. The evidence of these three witnesses will have to be evaluated on probabilities. It is noteworthy that witness Ramjibhai has not stated in his examination-in-chief that the deceased was saying that she was burnt but such a claim came to be made by him only during his cross-examination. Witness Ishwarbhai has claimed that when he enquired from the deceased as to what had happened the deceased had stated that she was burnt and not stated anything else. On reappreciationof evidence of these three witnesses, we find that if Ishwarbhai had put any question to the deceased, witness Ramjibhai and defence witness Gelabhai would not have missed to refer to this vital fact in their depositions but these two witnesses have not claimed that any question was put by Ishwarbhai to the deceased and that in answer thereto, the deceased had stated that she was burnt. Therefore the claim made by witness Ishwarbhai that he had asked the deceased as to what had happened and that the deceased had replied that she was burnt is not reliable. The learned Judge who had advantage of observing the demeanour of the witnesses has noted in the judgment that witness Ramjibhai had obliged the defence by agreeing with the suggestion made by the defence. If the deceased had stated that she was burnt the natural conduct of defence witness Gelabhai and witness Ramjibhai would have been to enquire as to how

she had received burn injuries but their evidence does not indicate that they had made any such inquiry with the deceased. This conduct of the witnesses makes their testimony before the court doubtful. According to these witnesses, at the time of incident, they had seen the appellant no. 1 wearing a bath towel round the waist which appears to be highly improbable. The burnt towel was produced before the court during the course of trial as article no. 3 and it was examined by the learned judge. On examination, the learned judge found that the towel was extensively burnt and it was not possible to wear it round the waist. Along with the towel, particles of plastic dish normally used for covering a cup of tea were also found and therefore the claim of appellant no. 1 that he had come out of the bath room wearing bath towel and tried to extinguish fire on the deceased is not only highly doubtful but improbable and cannot be accepted because it is not the case of the appellant no. 1 that he had taken off the towel and tried to extinguish fire with that towel and had again covered his body with that burnt towel. Further, Ramjibhai p.w.9 has stated in his evidence that they had placed quilt (mattress made by joining small pieces of cloth together) on the deceased but in the next breath he claimed that quilt was not placed on the deceased but cotton bed was placed on the deceased. From the contents of panchanama of place of incident, it is evident that no cotton bed was found from the place of incident at all which further makes the evidence of this witness highly unreliable and affects the impartiality of the witness. The evidence of these three witnesses being improbable and unreliable is rightly rejected by the learned judge as untrustworthy of acceptance. Moreoever, the presence of witness Ishwarbhai at the place of incident is also doubtful because according to him, he has to leave his house for his work at about 7.45 a.m. to 8 a.m.and it is not his case that while going to his place of work, he has to pass by the house of the appellant no. 1. The evidence on record would show that witness Ishwarbhai who is also brother-in-law of the appellant no. 1 had also gone to Civil hospital, Ahmedabad along with elder brother of the appellant no. 1 when deceased was removed to Civil Hospital,Ahmedabad and thus in a way he is an interested witness. The claim made by witness Ishwarbhai that the deceased had informed him that she was burnt but had not stated the reason for the same is highly doubtful. Witness Gelabhai is a defence witness and a reasonable reading of the testimony of this witness indicates that he has deposed to help the appellants. Further Mongiben who is mother of the deceased did not support the prosecution but she was contradicted with her earlier

police statement and the contradictions have been proved through the evidence of P.I.Mr.Zhala. On over all view of the evidence of these three prosecution witnesses namely witness Ishwarbhai, witness Ramjibhai and witness Mongiben as well as defence witness Gelabhai, we are satisfied that their evidence is highly improbable and the claim made by them that the deceased had informed them that she was burnt and had not stated anything else is unreliable. Even if it is assumed for the sake of argument that the claim made by three witnesses that the deceased had stated in their presence that she was burnt and had not stated anything else is believed to be true, we are of the opinion that the deceased could not have stated anything in presence of her husband and Ishwarbhai who is brother-in-law of appellant no. 1 and therefore that fact by itself cannot be treated as a circumstance in favour of the appellants.

The evidence of Dr.Priyadarshi, p.w. 2 makes it evident that he had tried to know the history of burns from the deceased and deceased had stated before him that her husband and mother-in-law had poured kerosene on her and set her on fire. This doctor is corroborated by medical papers exh. 11 which makes his testimony more reliable. This doctor was cross-examined at length on behalf of the appellants but it could not be brought on record that the deceased had lost consciousness at any point of time. The defence could not bring anything on record so as to create doubt about the version of the doctor that he had recorded the history of incident as narrated by the deceased. The evidence of Dr.Priyadarshi gets corroboration from the evidence of Smt.Bhanumatiben p.w. 14 who was officer in-charge of Joravarnagar police station at the relevant time. Dr.Priyadarshi has stated in his deposition that after recording the history in the medical papers as narrated by the deceased, he had informed P.S.O. of Joravarnagar police station about the same. Smt.Bhanumatiben has stated in her testimony that she had received an information from Doctor Priyadarshi that the deceased had stated before him that the appellants had together poured kerosene over her and had set her ablaze and that she had made entry in the register mentioning the said fact. The entry is produced by her at exh. 42. According to this witness, she had prepared a copy of the entry and handed over the same to P.S.I. Mr.Zhala and had also informed the Executive Magistrate to record the dying declaration of the deceased. The evidence of Smt.Bhanumatiben is amply corroborated by documentary evidence which is produced at exh. 42. We may state that this witness was not cross-examined by the defence at all. Where the

substantive evidence of a witness is allowed to go unchallenged with regard to a particular point, it may safely be accepted as true. Therefore evidence of Dr.Priyadarshi gets ample corroboration from the sworn testimony of Smt.Bhanumatiben who is examined as p.w.14 at exh. 41. The oral dying declaration of the deceased as recorded by Dr.Priyadarshi, proves the case of the prosecution against the appellants. The testimony of P.S.I. Mr.Zhala would show that on receipt of copy of entry made in register by Smt.Bhanumatiben, he had gone to Mahatma Gandhi hospital, where the deceased was admitted and had also requested Smt.Sharmistaben Trivedi p.w. 7 who was then Chairman of Nari Kendra, Surendranagar to proceed to the hospital, after informing her about the incident. The evidence of P.S.I.Mr.Zhala establishes that after going to the hospital, he had ascertained from Dr. Arun Lathiya whether the deceased was conscious and in a fit state of mind to make statement. The evidence of Mr.Zhala further shows that the doctor, after examining the deceased, had informed him that deceased was conscious and was in a fit state of mind to make statement and therefore he had recorded the complaint as given by deceased. P.S.I.Mr.Zhala has further claimed in his evidence that at the time when the complaint of the deceased was recorded, Smt.Sharmistaben Trivedi was present and after the complaint was reduced into writing, thumb impression of the deceased was obtained in presence of Smt.Sharmtistaben. This part of evidence of P.S.I.Mr.Zhala is not effectively challenged at all. Smt. Sharmistaben Trivedi p.w.7 exh. 25 in her deposition before the court has stated that on receipt of information about the incident from police, she had gone to Mahatma Gandhi Hospital where in her presence complaint of the deceased was recorded by P.I.Mr.Zhala. It is true that she has not referred to the particulars stated by the deceased before Mr.Zhala. However, we are of the opinion that it was not necessary at all for her to enumerate the particulars stated by the deceased and recorded by Mr.Zhala during the course of her examination. Evidence of Smt.Sharmistaben is that of an independent witness. She is neither related to the deceased nor is she on inimical terms with any of the appellants and she had no reason to depose falsely before the court that in her presence P.S.I.Mr.Zhala had recorded the complaint of the deceased as narrated by her. Dr.Arun Lathiya p.w.3 has clearly and in no uncertain terms stated before the court that before recording the complaint, P.S.I. Mr.Zhala had through him, got verified that the deceased was conscious and was in a fit state of mind to make statement. This witness has further deposed that he had made an endorsement on

the complaint to the effect that "patient is conscious and cooperative and able to give answers with full consciousness." All these witnesses have no reason to depose falsely against the appellants and involve them in serious crime and therefore their evidence deserves acceptance more particularly in absence of material contradictions or omissions appearing in their evidence. The free translation of the complaint which was recorded by P.S.I. Zhala as narrated by the deceased is as under :

" My name Jayaben w/o Jayantibhai Amarshibhai by caste potter (prajapati) aged 25 years occupation household residing at Street No. 16, Ratanpar.

Upon asking in person, I declare and state that I reside with my husband and mother-in-law at the aforesaid address and I am doing household work. I have one daughter and a son. Daughter Daksha is five years old and the son Mahelu is 9 months old. My marriage was solemnised before ten years. My husband is working as a clerk in a shop of cloth at Surendranagar.

Today I, my husband, mother-in-law and the children were in the house at about eight o'clock in the morning. I prepared tea and bhakhri (flat hard cake-bread). On asking my mother-in-law and the husband to eat, they got offended and started telling me that they do not want to eat food prepared by me. After saying so my mother-in-law poured the kerosene on me and my husband set me on fire by igniting a match stick and so my whole body started burning. I shouted but my husband and my mother-in-law did not extinguish fire on me. So I came in falia (street) in burning condition. At that time our neighbours viz. Ghalabhai Chhashwala and Ramjibhai Prajapati etc. arrived and extinguished fire on me. In the meantime the husband of my husband's sister viz. Ishwarbhai also arrived and took me to hospital in rickshaw. At present I am fully conscious.

The cause of this incident is that my husband is working as a clerk and the salary is paid on first but the salary is not given, though ten-twelve days have passed this month. I was demanding the pay for buying essential articles in the house but he was not giving and was insisting to keep the food ready. He was giving abuses off and on. Though I prepared tea and

bhakhri (flat hard cake-bread), my mother-in-law poured the kerosene on me and my husband set me on fire by igniting a match stick saying that they did want to eat food prepared by me and I am not liked. Thus I am burnt on the whole body and so this is my complaint with prayer to take legal action against them.

This is my complaint proper and true as dictated by me and I have placed my thumb impression hereunder on being read over to me."

A bear reading of the complaint makes it manifest that the appellant no. 2 had poured kerosene over the deceased and the appellant no. 2 had set her on fire.

The evidence of Executive Magistrate Tapubhai M Vaghela indicates that on receipt of communication asking him to record the dying declaration of the deceased he had proceeded to Mahatma Gandhi hospital and after reaching the hospital, had verified from Dr.Lathiya as to whether the deceased was conscious and in a fit state of mind to make statement. The witness in no uncertain terms has asserted before the court that after examining the deceased, he was informed by Dr.Lathiya that the deceased was conscious and was able to make statement. According to witness Vaghela, thereafter he had recorded dying declaration of the deceased which is produced on record of the case at exh. 8. The evidence of Executive Magistrate Mr.Vaghela p.w.no. 1 is amply corroborated in all particulars by sworn testimony of Dr. Arun Lathiya p.w.3 who has stated that at the instance of Executive Magistrate Mr.Vaghela, he had examined the deceased and found the deceased conscious and capable of making statement. Dr.Lathiya has claimed that he has made endorsement on the dying declaration to the effect that deceased was fully conscious and cooperative and able to give answers with full consciousness. Though Executive Magistrate Mr.Vaghela and Dr.Lathiya were cross-examined at length, nothing could be elicited to doubt their version as given by them in their respective examination-in-chief. The evidence of Executive Magistrate, Mr.Vagehla proves beyond any reasonable doubt that he had recorded the dying declaration of the deceased as stated by her. Free translation of the dying declaration recorded by Executive Magistrate Mr.Vaghela between 10.45 a.m. to 11.10 a.m. which is in Gujarati language is as under :

"Joravarnagar police station officer has, vide letter being outward entry no. 7/92 dated

12/07/92, informed that Bai Jayaben Jayantilal, aged 25 years by caste potter, residing in street no. 16 at Ratanpar, Joravarnagar, is hurt by burning and so it is conveyed to record the dying declaration. Therefore I remained present at hospital and met the doctor. Having been informed by him that the patient is conscious and is able to give statement the statement of the patient is recorded as under.

My name is Jayaben. I reside at Ratanpar. My age is 25 years. I am potter by caste. My husband's name is Jayantilal Amarshibhai. We i.e. I, my husband, mother-in-law and my daughter and a son are staying. I have burn injury at the waist, breast, on hand, leg and abdomen. My mother-in-law Kunwarben got me burnt by pouring kerosene and my husband burnt me with a match stick. My husband and my mother-in-law have set me on fire. My husband was not giving money and as there was no eatables in the house, there was quarrel with my mother-in-law and husband. The quarrel was taking place regarding money for food grains etc. in the house. My husband did not like me and so he was giving threat to kill me frequently. My mother-in-law and my husband have set me on fire.

I do not want to state any other particular except aforesaid facts. I have stated these facts in my consciousness. I have not burnt myself but my husband and my mother-in-law have set me on fire.

I have placed my right hand thumb impression for making the aforesaid facts because this hand is severely burnt and so left hand thumb impression was taken."

The dying declaration of the deceased establishes beyond reasonable doubt that the appellant no. 2 had poured kerosene over the deceased and thereafter the deceased was set on fire by the appellant no. 1.

The discussion of the evidence of the above witnesses would indicate that the testimony of Dr.Priyadarshi is supported by medical papers as well as testimony of Smt. Bhanumatiben. The evidence of Smt.Bhanumatiben is corroborated by documentary evidence exh. 42 as well as by testimony of P.S.I.Mr.Zhala and Executive Magistrate Mr.Vaghela. The evidence of P.S.I.

Mr.Vaghela is fully corroborated by independent evidence of Smt.Sharmistaben recorded at exh. 25 as well as evidence of Dr.Arun Lathiya p.w. 3. The evidence of Executive Magistrate Tapubhai Vaghela is also in all particulars supported by evidence of Dr.Arun Lathiya p.w. 3 and other documentary evidence on record. Though Mr.Vaghela had not recorded the dying declaration in question and answer form, it is evident that questions were put by him to the deceased which were answered by her and answers were recorded. The evidence of witnesses testifying to the dying declaration passes the test of careful scrutiny of the court. It is relevant to notice that all the witnesses testifying to the different dying declarations had occasion to meet and deal with the deceased in the discharge of their duties. It can hardly be said that they were interested in the deceased who was an ordinary woman on the earth. Also, these witnesses had no reason to depose against the appellants falsely because the witnesses are not likely to get any benefit by deposing against the appellants. The plea that the vocal cord of the deceased was adversely affected rendering her speechless and therefore the dying declarations should be disbelieved has no substance at all. The evidence of the witnesses testifying to the dying declarations makes it manifest that the deceased was not rendered speechless and she was speaking coherently. Further the medical evidence on record including oral testimony of doctors, does not even remotely suggest that the vocal cord of the deceased was affected in any manner. There is no manner of doubt that the dying declarations are true and free from any embellishment and therefore the dying declarations by themselves are sufficient for recording conviction even without looking for any corroboration. There are no infirmities found in the dying declarations which are of such nature as warranting further assurance. The three dying declarations are in material particulars consistent with each other. The deceased as a victim had ample opportunity to identify the appellants as her assailants. The version narrated by the deceased is intrinsically sound and accords with probabilities. No material part of any dying declaration is proved to be false by other reliable evidence on record. Under the circumstances, we are of the opinion that the learned Judge did not commit any error in relying upon these three dying declarations for the purpose of convicting the appellants for causing death of the deceased.

The contention that the statement made by the deceased before Dr.Shah at the time of her admission in Civil Hospital, Ahmedabad to the effect that the end of

her sari had come in contact with flame and therefore she received burn injuries exonerates the appellants has no merits. As observed earlier, the appellant no. 1 against the medical advice had removed the deceased from Mahatma Gandhi hospital, Surendranagar to Ahmedabad Hospital. The evidence on record does not show that any relative of the deceased was with her when she was removed to Civil Hospital, Ahmedabad. Thus, the evidence would indicate that all the time the deceased was surrounded by the relatives of the appellants. Though the transfer form was sent to Dr.Shah wherein it was mentioned that the history of assault as stated by the deceased was noted down and that the complaint as well as dying declaration were also recorded, it could not be explained by Dr.Shah as to in which circumstances, he had recorded the history second time at the time of admission of the deceased in Civil Hospital, Ahmedabad. Further, the statement made by the deceased that she had received burn injuries because the end of her sari had touched the flame of the stove stands falsified by the contents of panchanama of place of occurrence and other circumstances proved on the record of the case. The panchanama of place of occurrence shows that two stoves were found in kitchen and on one stove prepared tea in a lota (a kind of metal pot) covered with a shieve was found whereas the other stove was found lying horizontally. Even pieces of prepared Bhakhri were also found. The panchanama of place of the incident does not indicate that there was any baking pan or iron pan on which any bhakhri was being baked. As no bhakhri was being baked at all, the possibility of end of sari of the deceased accidentally touching flame of the stove stands ruled out. Further on admission of the deceased at Mahatma Gandhi Hospital, Surendranagar, she was treated by Dr. Priyadarshi. Dr.Priyadarshi had issued certificate regarding the injury sustained by the deceased which is produced on the record of the case at exh. 10. In the said certificate, it is clearly mentioned that kerosene smell was present all over the body of the victim. If the deceased had sustained burn injuries because of end of her sari coming in contact with flame, kerosene smell all over her body would not have been found present as is stated in exh. 10. The post mortem notes further would indicate that the deceased had sustained the second and third degree burns on face, neck, chest, abdomen, both upper limbs and lower limbs, back etc. If the deceased had received burn injuries due to end of her sari coming in contact with the flame of the stove, she would have received first degree burns at least on some parts of her body which is not found at all by any of the doctors. The record of the serologist produced on record of the case at exh. 36

makes it manifest that on partly burnt green coloured blouse of the deceased as well as burnt pieces of clothes, residual of petroleum hydrocarbon (kerosene) was detected. We note that the report of the serologist was admitted in evidence in view of provisions of Sec. 293 of the Cr.P.C. and the defence never challenged the same by demanding cross-examination of the expert who had prepared the report. It was never brought on record by the defence that the clothes worn by the deceased were made of polyester and therefore residual of petroleum hydrocarbon was found on analysis. Kerosene would not have been detected from clothes of the deceased if end of her sari had caught fire accidentally from the flame of the stove. The cumulative effect of above referred to circumstances is that the statement made by the deceased before Dr.Shah that the end of her sari had come in contact with flame of the stove and therefore she had received burn injuries is thoroughly unreliable and stands falsified. The consequent entries made in inquest report and other police records on the basis of the history before Dr.Shah lose all their importance. We further notice that witness Ramjibhai p.w. 11 exh. 31 has stated in his evidence that on July 16, 1992 he was on duty as Police Constable at Civil Hospital and he had recorded the particulars in wardhi as given by Dr.Modi. This Dr.Modi is not examined in the case at all. There is no manner of doubt that on expiry of the deceased on July 16, 1992 some information must have been conveyed by Dr.Modi to Police constable on duty at Civil Hospital on the basis of history of assault noted on the medical papers by Dr.Shah. Therefore, the evidence of witness of Ramjibhai also does not help the appellants.

In Harjit Kaur etc. V/S State of Punjab 1999 Cr.L.J. 4055, circumstances showing that the deceased was not free person at the time of recording first dying declaration were brought on recorde and therefore reasons given for not considering the first dying declaration as voluntary and true were accepted as convincing and second dying declaration recorded was accepted as true one and not as contrary to statement made by the deceased earlier. In Mohanlal Gangaram Gehani V/S State of Maharashtra AIR 1992 S.C. 839, the victim had stated the name of a particular person as his assailant to the doctor who had examined him. Subsequently, he had given the name of another person as his assailant who was not known to him before the appellants. On appreciation of evidence, the Supreme Court held that the statement made by the victim to doctor being first in point of time should be preferred to his subsequent statement. On over all appreciation of evidence, we are satisfied that the

three dying declarations i.e. oral dying declaration before Dr. Priyadarshi, complaint registered by P.I.Mr.Zhala which must be treated as dying declaration of the deceased on her expiry and dying declaration recorded by Executive Magistrate Mr.Vaghela are trustworthy as well as reliable and the statement made by the deceased before Dr.Shah at Ahmedabad Hospital stands falsified by the circumstances which stand proved on record of the case. Therefore, we are of the opinion that the learned Judge did not commit any error in discarding the history of assault as noted down by Dr.Shah at Civil Hospital,Ahmedabad.

The contention that the deceased had made an attempt to extinguish fire on the deceased which shows his innocence and therefore the appeal should be accepted is devoid of merits. In the earlier part of the judgment, we have observed that the learned trial judge had seen towel which was produced before the court as article no. 3 and the learned judge has found that it was extensively burnt and could not have been worn round the waist. The claim made by appellant no. 1 that at the time of incident, he was in bath room and had tried to extinguish fire on the deceased is not probable at all because it is not his case that he had removed the bath towel from his person and had tried to extinguish the fire on the deceased with the help of the towel wearing a nicker or nothing. Moreover, the injury certificate of the appellant no. 1 is produced on the record of the case at exh. 13. It indicates that the appellant no. 1 had burn over the right hand on the dorsal aspect which was scattered and superficial and he had also abrasion over the right foot about 1cm x 1cm. In the certificate, it is clearly mentioned that both the injuries sustained by the appellant no. 1 were simple in nature. If the appellant no. 1 had tried to extinguish fire on the deceased, burn over right hand on the dorsal aspect would not have been found but in probability fingers, tips and palm would have been found burnt. Further, if any attempt had been made by the appellant no. 1 to extinguish fire, both the hands would have received burn injuries because it is not possible to accept the claim of the appellant no. 1 that he had tried to extinguish fire with the help of only one hand. Having noticed the contents of the injury certificate relating to appellant no. 1 as well as over all circumstances present on the record of the case, we are satisfied that the appellant no. 1 had in fact not made any attempt to save the deceased. The claim made by the appellant no. 1 that part of hair were also burnt stands falsified because it is not so mentioned in the certificate of injury. As no

attempt was made by the appellant no. 1 to save the deceased, it is evident that a false plea is put up by the appellant no. 1 to invoke sympathy of the court which is a circumstance against him.

The plea that from the place of incident only one burnt match stick was found which falsifies the case of the prosecution that the appellant no. 2 had poured kerosene over the deceased and that the appellant no. 1 had set the deceased on fire by lighting match stick has no substance at all. Witness Niranjan Bhadeliya p.w.5 exh. 18 who has proved panchanama of place of incident has clearly stated in his evidence that at the place of incident, he had seen 2 to 3 burnt match sticks. During his cross-examination he has maintained that mention of only one burnt match stick having been found in the panchanama of place of incident is false and that he had actually seen 2 to 3 burnt match sticks but he had not thought it fit to get the things correctly recorded in the panchanama of place of occurrence. The panchanama of place of occurrence would show that there were patches of kerosene near the entrance of kitchen, in osri and in falia. If the deceased had received burn injuries because of end of her sari coming in contact with live flame of the stove, such kerosene patches would not have been found in different parts of the house. The claim made by P.S.I.Mr.Zhala in his evidence that he had minutely examined the place of incident and found only one burnt match stick does not get corroboration from the testimony of panch witness and on the contrary stands contradicted by the evidence of panch witness Niranjan Bhadeliya. In any view of the matter, even if it is assumed that only one burnt match stick was found from the place of incident, that fact by itself is of no consequence and cannot lead the court to the conclusion that the deceased was not set on fire by the appellant no. 1 after kerosene was poured over her by appellant no. 2 because the cumulative effect of all the circumstances including reliable dying declarations proved has to be taken into consideration and not effect of one solitary fact proved.

The plea that the deceased might have committed suicide and therefore the appeal should be accepted has also no merits. The record shows that the marriage of the deceased with apepllant no. 1 was solemnized some 10-15 years prior to the date of the incident. It is not the case of the appellant that at the time of his marriage with the deceased, he was earning more and that his salary subsequently got reduced or decreased. In fact shortly after the marriage, the appellant no. 1 had

incurred debt of a bank. The deceased may be facing some problem because of small salary of the appellant no. 1 but she was staying with the appellant no. 1 since long and had adjusted herself in the family of the appellant no. 1. The record does not indicate that she had attempted to commit suicide in past or that she had exhibited suicidal tendencies. As observed earlier, at the time of incident, the eldest child of the deceased was 5 years old and another child was 9 months old. When the deceased had children of young age, normallyshe would not commit suicide and leave them in lurch all alone. This aspect of the matter has been considered by the learned Judge of the trial court in detail in para 29 of the judgment with which we agree.

Though the appellant no. 2 contended in her written statement that at the time of incident, she was not present in the house and had gone for service at the asylum, she did not examine anyone ins support of her this claim and the defence of alibi pleaded by appellant no. 2 stands totally unproved which is also a circumstance against her.

The net result of the above discussion is that the prosecution proves beyond reasonable doubt that the appellant no. 2 had poured kerosene over the deceased and apepllant no. 1 had set her on fire by lighting a match stick and caused her death. In our view, on reappreciation of the evidence, we do not find that any error is committed by the learned judge in convicting the appellants under Sec. 302 read with 114 of I.P.C. The result is that the appeal cannot be accepted and is liable to be dismissed.

For the foregoing reasons, the appeal fails and is dismissed. The appellant no. 2 who is on bail is directed to surrender to the jail authorities on or before July 31, 2001 failing which she shall be taken into custody by the authorities so that she undergoes sentence imposed by the learned judge which is confirmed by us in the appeal. Muddammal to be disposed of in terms of directions given by the learned judge in the impugned judgment.

(J.M.PANCHAL, J)

(SHARAD D DAVE, J)

/srilatha/